

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ANTHONY III,

Defendant and Appellant.

C066864

(Super. Ct. No. MF032367A)

A jury convicted defendant John Anthony III of kidnapping for the purpose of oral copulation and sodomy, forcible oral copulation and sodomy, carjacking, first degree robbery, one count of second degree robbery (involving a purse), and making criminal threats. The jury was unable to reach a verdict as to a count of sexual penetration with a foreign object (count 4) and another count of second degree robbery (count 6—involving a cell phone). On the prosecutor's motion, the trial court dismissed both of those counts in the interests of justice.¹ The

¹ All of these offenses occurred with the same victim after 10:00 p.m. on the night of July 10 through the early morning hours of July 11, 2009. There was also a conviction for second degree robbery involving a different victim on a different date.

jury also sustained enhancements to both sexual offenses that defendant had kidnapped the victim and substantially increased the risk of harm as a result of the movement. (Pen. Code, § 667.61, subd. (d)(2).)² The trial court found defendant had two prior serious felony convictions within the meaning of section 667, subdivision (d).

At issue on appeal is the manner in which the trial court fashioned defendant's sentence. The court imposed consecutive sentences of 75 years to life each for the two sexual offenses (§§ 667, subd. (e)(2)(A)(i), 667.61, subd. (a)) and consecutive sentences of 25 years to life for each of the remaining offenses (§ 667, subd. (e)(2)(A)(ii)), except for a concurrent sentence for the second degree robbery conviction involving the victim's purse at the outset of the carjacking. It also "dismissed" the kidnapping conviction (count 1) for "purpose[s] of sentencing" as "merged" in the kidnapping enhancements for the sexual offenses.³ It granted conduct credits that were limited to 15

However, we will omit any further reference to that robbery conviction because it is not material to any of defendant's arguments on appeal.

² Undesignated statutory references are to the Penal Code.

³ We are not aware of any authority for treating the kidnapping conviction in this manner. As the People correctly point out, section 209, subdivision (d) contains an express provision allowing the same acts to constitute a violation both of the kidnapping statute and the enhancements in section 667.61, but permitting punishment only under the latter. As with the more general restriction in section 654, the trial court consequently should have imposed but *stayed* sentence on the kidnapping conviction. (Cf. *People v. Byrd* (2011) 194 Cal.App.4th 88, 101-102 (*Byrd*) [*not required to stay sentence on simple kidnapping*

percent of defendant's presentence custody credits. (§ 2933.1.) In response to a request from appellate counsel, the trial court awarded an additional day of actual custody and filed an amended abstract of judgment in May 2011.

Defendant, in his original briefing and in a supplemental brief, raises three areas of concern. He argues the trial court should have stayed sentence on the carjacking conviction (§ 654) because it was an indivisible part of a kidnapping for the purpose of committing the sexual offenses. He also contends consecutive sentences for the sexual offenses were not mandatory because they did not occur on "separate occasions" within the meaning of either of the applicable statutes. (§§ 667, subd. (c)(6) & 667.61, subd. (i).) Finally, he asserts consecutive sentences for the carjacking and the criminal threats were not mandatory because they did not occur on separate occasions under section 667, subdivision (c)(6). We shall affirm the judgment as modified in accordance with footnote 3, *ante*.

FACTUAL AND PROCEDURAL BACKGROUND

The nature of defendant's appellate contentions requires only an outline of his course of criminal conduct, relying of course only on the facts in favor of the judgment. (*People v. Mack* (1992) 11 Cal.App.4th 1466, 1468.) We omit the remainder of the particulars.

if punished pursuant to section 667.61 as well, because section 207 does *not* contain provision similar to section 209].) We will modify the judgment accordingly.

After dropping off two of her daughters and their friends at a late movie in Manteca, the victim was sitting in her car at a gas station, talking on her cell phone. Defendant approached her car and asked to use the phone. When she demurred, he hit her and grabbed the phone. Putting a gun to her head, he then emptied her purse and commandeered the car, ordering her to move over to the passenger seat.

As he started to drive away with her, defendant repeatedly told the victim he was going to kill her. After driving for "a long time," with the victim's head pushed down into his lap, defendant stopped in what the victim thought was a dark and isolated grove. He directed her to get out of the car and disrobe.

He pulled her down to her knees by her hair. His pants were down, and he forced his penis into her mouth. When she complained that her mouth hurt because he had struck her, he directed her to remove the rest of her clothes. He pushed her face down onto the back seat of the car. He first penetrated her anus with his fingers, then sodomized her until he ejaculated. This was extremely painful for the victim.

Gun in hand, defendant told her to dress and get back into the car. As they drove along, he repeated his threats to kill her, assuring her that he was a bad man. At one point, he pulled over to the side of the road and warned her to be silent on pain of death. When deputies stopped to check why he was stopped, defendant kept his gun inside his T-shirt while they

questioned defendant and the victim. Out of fear, she told the deputies everything was fine. The deputies left, at which point defendant resumed driving.

Her cell phone rang, and defendant allowed her to answer. In separate calls, the daughters she had dropped off in Manteca and another daughter in Stockton told her they were ready for her to pick them up. Defendant drove her back to the Manteca theater, where the two daughters and their friends got into the car. Defendant then drove the group to Stockton to pick up the other daughter, dropping off the friends on the way.

In Stockton, they picked up the other daughter and her friends. After dropping off this pair of friends, defendant drove the victim and her daughters to a grocery store and parked in the lot. Leaving the puzzled daughters behind, he led the victim to a gas station where he had parked his own car. He then drove her to an ATM, where he forced her to withdraw money for him. He dropped her off in a parking lot across the street from her car.

DISCUSSION

I. Section 654

Taking an unduly narrow view of his actions, defendant contends the trial court erred in imposing a separate sentence for his carjacking conviction. He claims it "was part of an indivisible transaction[, the] single objective [of which] was to kidnap [the victim] to commit the sex offenses."

Section 654 precludes multiple punishment where an act or course of conduct violates more than one criminal statute but a defendant has only a single intent and objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) However, even where there is a single course of conduct pursuant to one objective, if a defendant continues to pursue that objective despite a temporal separation between the individual acts that affords an opportunity to reflect, that defendant can be punished for each of the individual acts. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640 (*Andra*).) On this issue, we review the trial court's explicit or implicit factual resolutions for any substantial evidence in the record. (*Liu*, at pp. 1135-1136; *People v. Coleman* (1989) 48 Cal.3d 112, 162.) The failure of defendant to object on this basis in the trial court does not forfeit the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

In the first place, while defendant's carjacking may have initially been for the purpose of committing the sex offenses, over the course of its protracted duration defendant apparently developed the independent objective of robbing the victim's bank account once he rid himself of her children and their friends. Furthermore, even if the goal of an ATM robbery had never arisen until after defendant and the victim changed vehicles, his failure to end the carjacking⁴—despite numerous opportunities

⁴ As defendant acknowledges, robbery is a continuous offense lasting until the robber reaches a place of relative safety.

for reflection (either after the encounter with the deputies or in any of the several stops during the strange interlude in which he was playing carpool)—warrants separate punishment.

II. Sections 667.61 and 667

A. Criteria

Section 667.61, subdivision (i) *mandates* the imposition of consecutive sentences for offenses subject to its terms if the offenses against a single victim occurred on “separate occasions as defined in [section 667.6, subdivision (d)].” The cross-referenced statute requires evidence that a defendant had a reasonable opportunity to reflect between offenses but chose to continue his behavior. In the absence of evidence of this opportunity to reflect, the sentencing court otherwise has discretion to choose between imposing concurrent and consecutive sentences. (See *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524.)

Similarly, for a recidivist with a prior conviction for a serious felony within the meaning of section 667, subdivision (d), consecutive sentences are *mandatory* for the current felony conviction *unless* they were “committed on the same occasion” or arose “from the same set of operative facts.” (§ 667, subd.

(*People v. Estes* (1983) 147 Cal.App.3d 23, 28.) And, “there is an undeniable measure of overlap between robbery and carjacking” (other than the specificity of property seized and the temporary dispossession punished under the latter), thus making carjacking a “direct offshoot” of robbery. (*In re Travis W.* (2003) 107 Cal.App.4th 368, 373-374.)

(c)(6); *People v. Casper* (2004) 33 Cal.4th 38, 42.) Offenses occur on the same occasion where they have a close temporal and spatial proximity (*People v. Deloza* (1998) 18 Cal.4th 585, 594-596 (*Deloza*)); if so, then it is immaterial whether or not they also arise from common operative facts (see *Deloza*, at p. 596, fn. 7; *People v. Hall* (1998) 67 Cal.App.4th 128, 139). The latter criterion focuses on whether there are acts or elements that “unfold together or overlap.” (*Byrd, supra*, 194 Cal.App.4th at p. 104.) These criteria, which are broader than those applicable under section 654, are concerned with a multiplicity of offenses rather than a multiplicity of objectives; and, therefore, even if a defendant may incur multiple punishment, this does not mean multiple consecutive punishment is warranted. (*Deloza, supra*, 18 Cal.4th at pp. 588, 594-595 [“‘crimes of violence’” exception to section 654 not relevant to section 667, subdivision (c)(6) because criteria not “coextensive”]; *Byrd, supra*, 194 Cal.App.4th at p. 104.)

B. Analysis

During its pronouncement of judgment, the trial judge stated “I think [the ultimate sentence] is *required by law* and is appropriate under the circumstances.” (Italics added.) We note that the probation report did not make any proposal for the structure of the sentence or analyze the issue of concurrent or consecutive sentences. The parties disputed whether mandatory consecutive sentences were required under section 667.61, but did not discuss section 667 in any respect.

Based on the emphasized phrase above, defendant argues the trial court must have believed it lacked discretion to impose concurrent sentences. He contends this was incorrect, because (1) he did not commit the sex offenses on separate occasions, triggering mandatory consecutive sentences under section 667.61, and (2) he committed the sexual offenses, the carjacking, and the criminal threats on the same occasion or during the same set of operative facts, and thus section 667, subdivision (c)(6) did not mandate consecutive sentences.

1. The Sexual Offenses.

Relying on the occurrence of the two sexual offenses "in the same place, one right after the other," defendant argues there was an absence of any appreciable interval between them in which he could have reflected on his actions before continuing. We disagree.

Defendant cites the holdings in other cases that did not find appreciable intervals between sexual offenses. However, on a fact-specific issue such as this, there is little if any value to be derived in comparing the facts of the case at bar with facts in other cases (e.g., *People v. Rundle* (2008) 43 Cal.4th 76, 137-138 [sufficiency of evidence]; *People v. Ault* (2004) 33 Cal.4th 1250, 1267 [finding error harmless]). It is sufficient to note the victim's protestations of pain gave defendant pause in the midst of forcing her to fellate him, whereupon he moved her from the ground to the back seat of the car and commenced an act of a different nature. We hardly credit defendant with the motive of

compassion for the victim's pain that he claims on appeal—he did not cease his assault, but chose a different method and continued until he achieved climax—and therefore do not find anything that is “illogical” about two punishments rather than only one if he had continued with the oral copulation. Therefore, consecutive sentences for the sexual offenses were mandatory under section 667.61. This moots his claim that they were not mandatory under section 667.

2. The Carjacking.

In imposing a consecutive sentence for the carjacking, the trial court found in accordance with defense counsel's concession (who had focused on the initial taking without considering the continuous nature of the offense) that it was “separate” from the other offenses, without any elaboration. As noted above, under section 654, that is undisputable. However, this *continuous* offense had a close temporal and spatial relation to the sexual offenses *and* the criminal threats (as well as the kidnapping and purse robbery). The act of carjacking “unfolded” together with these other offenses as well even if the acts did not “overlap.” (This contrasts with the distinct ATM robbery that ensued after he drove off with the victim in his own car.)

The trial court thus had discretion to impose sentence on the carjacking concurrent with the sexual offenses. However, we do not agree with defendant that we must remand for the trial court to exercise this discretion in the first instance on this entirely academic point. As we quoted above, the court found the sentence

of 250 years to life to be "appropriate" under the circumstances of the case. We therefore do not find it reasonably probable that the court would impose a concurrent sentence when asked expressly to consider that option.

3. The Criminal Threats.

To reiterate, the victim identified criminal threats that defendant had made on their way to the grove, as they drove away from the grove, and as the deputies approached the stopped car.⁵ The court instructed the jury it had to agree unanimously on the factual basis for this offense. Defense counsel conceded the conviction for criminal threats "appears to be a separate act," and the trial court focused on defendant's independent desire to terrorize "from the beginning" even though it was not necessary to achieve his aims.

Defendant argues "[s]ome of these criminal threats occurred in close temporal and spatial proximity to the sex offenses; others probably did not." He contends the trial court, by virtue of the variation on "rule of lenity" announced in *People v. Coelho* (2001) 89 Cal.App.4th 861, 885 (*Coelho*), was obligated

⁵ Although defendant suggests criminal threats occurred *during* the sexual offenses, he does not identify any specific testimony to this effect. In the context of her *initial abduction*, the victim testified, "he was telling me, . . . every moment he was saying I'm going to kill you." In the context of defendant's actions as they drove away from the grove, she testified, "He was telling me repeatedly that he was going to kill me. The whole time." But the victim did not make any reference to threats as she related the circumstances of the sexual offenses themselves.

to choose the criminal threats most closely associated with the sex offenses as the factual basis for the conviction in order to give itself the broadest discretion in sentencing him; under the exceptions in section 667, subdivision (c)(6), this would have accordingly allowed the trial court to impose a sentence on the conviction for criminal threats concurrent with the carjacking and the sex offenses.

We disagree with *Coelho* that the rule of lenity has any bearing on a trial court's evaluation of the trial record for purposes of sentencing. This is a "tie-breaking principle" of statutory interpretation (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1102, fn. 30) where legislative intent is utterly ambiguous on which of two reasonable interpretations should prevail (*People v. Manzo* (2012) 53 Cal.4th 880, 889). This was the issue before the courts in all of the cases cited in *Coelho*. (*Coelho, supra*, 89 Cal.App.4th at p. 885.) To support its assertion that this principle is "appropriate . . . to resolve ambiguity concerning the factual bases for convictions" toward the end of "determining the scope of a trial court's sentencing discretion" (*ibid.*), *Coelho* included a quote ultimately derived from *Ex parte Rosenheim* (1890) 83 Cal. 388, 391 (*Rosenheim*): A defendant is entitled to "'the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute'" as a matter of

"judicial policy." (*Coelho*, supra, 89 Cal.App.4th at p. 885, italics added.)

The context for the italicized phrase in *Rosenheim* is not apparent; most likely it refers to the various rules a jury, as a trier of fact, must apply as a matter of "judicial policy" in evaluating ambiguities in the evidence (e.g., equally plausible inferences pointing both to guilt or to reasonable doubt). But neither *Rosenheim*, nor any of the other cases cited in *Coelho*, remotely suggest that courts must apply this principle in their review of sentencing facts, and it is axiomatic that cases are authority only for issues expressly considered. (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1491.)

If we were reviewing the jury's verdict for substantial evidence, we would not be limited to any particular criminal threat. We do not agree that the trial court's sentencing decisions should be constrained in choosing among reasonable alternative bases for a verdict. Even where a jury has acquitted a defendant of an offense, the sentencing court may take facts related to that offense into account. (*People v. Towne* (2008) 44 Cal.4th 63, 85-89.) If we were reviewing a trial court's sentencing choices under section 654, we would presume any fact in support reasonably deducible from the evidence. (*Andra*, supra, 156 Cal.App.4th at pp. 640-641.) We would also review the decision to impose fully consecutive sentences under section 667.61 for substantial evidence. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230.) *Coelho*

subverts these ordinary standard of review of sentencing decisions in the context of section 667. We are not persuaded and respectfully disagree with its conclusion, and note that we have not found another case giving it effect.

Moreover, in the present case, the unanimity instruction was a superfluous happenstance. “[N]o unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction” and a defendant does not offer any distinct defenses to the different acts such that a jury could reasonably distinguish among them. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-275.) Had the trial court not instructed on unanimity, any of the threats would then have been a proper basis for the verdict, and therefore a proper basis for a sentencing choice. We do not believe the needless instruction should straitjacket a sentencing court’s review of the evidence in assessing the scope of its discretion under section 667.

Since there were criminal threats that unfolded at a time and place well after the completion of the sexual offenses and did not overlap them in any respect, a consecutive sentence for the offense was mandatory. At any rate, as with the conviction for carjacking, we do not believe it is reasonably probable that the trial court would have imposed a concurrent sentence even if it had discretion to do so.

DISPOSITION

A concurrent life term is imposed for the kidnapping count (count 1—§ 209, subds. (b)(1), (d)), execution of which is stayed (§ 654). As modified in this respect, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

_____, BUTZ, J.

We concur:

_____, ROBIE, Acting P. J.

_____, MAURO, J.